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Supreme Court of the United States

OCTOBER TERM, 1931. No [redacted] 48

LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI,
Petitioner,

against

PHILIP ELTING, Collector of Customs of the Port of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

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Supreme Court of the United States

LLOYD SABAUDO SOCIETA ANOMIMA PER AZIONI, Petitioner, *against* PHILIP ELTING, Collector of Customs of the Port of New York, Respondent.	OCTOBER TERM, 1931. No. .

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Petitioner, Lloyd Sabaudo Societa Anonima Per Azioni, prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Second Circuit (R. 638) entered February 8, 1932, affirming in part a judgment (R. 41) of the United States District Court for the Southern District of New York.

Fifteen causes of action for recovery of fines imposed under the Immigration Laws were stated. (R. 1-31). Twelve were dismissed. On cross appeals the Circuit Court of Appeals dismissed a thirteenth cause of action.

JURISDICTION.

The order on mandate below was entered on February 8, 1932, (R. 638).

Jurisdiction of this Court is provided by 28 U. S. C. s. 347 (a).

Opinions Below.

The opinion of the Circuit Court of Appeals was written by Judge Chase, Judges Manton and A. N. Hand concurring. (R. 633-636). It is reported 55 F. (2d) 1048, 1932 AMC 244; The opinion of District Judge Patterson appears at pages 535-552 of the record and is reported 45 F. (2d) 405, 1930 AMC 1620.

Statutes Involved.

The statutes involved are Section 9 of the Immigration Act of February 5, 1917 and the same section as amended and re-enacted in the Immigration Act of 1924 (8 USC Sec. 145). The only change made in 1924 was to increase the amount of the fines. In substance it makes it unlawful for a transportation company to bring to the United States from a foreign port an alien who may be suffering from one of the diseases or disabilities therein enumerated. It then provides:

"If it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company * * * shall pay * * * the sum of $1000, and in addition a sum equal to that paid by such alien for his transportation."

Questions Presented.

1. Whether exactions of fines by the Secretary of Labor under the above sections are subject to judicial review in cases in which it appears as a matter of fact that the aliens were subjected to competent medical examinations before embarkation and that such examinations did not disclose the existence of any disease or disability which might bar the aliens from admission to the United States.

2. Whether the same section, as amended, raising the fine to $1,000.00, as construed and applied by the Secretary of Labor in imposing fines, is constitutional.

3. Whether $1,000 penalties may be legally exacted from Steamship Lines by internment of vessels whenever an official of the Department of Labor forms a belief that the alleged disease of an immigrant was discoverable by competent medical examination abroad, when such officer has no special technical knowledge on the subject and when no real hearing is had, and when such officer considering himself an appellate court purports to consider as evidence proof submitted by the Line, but in fact relies solely on a certificate of doctors attached to the Public Health Service, that the disease might have been discovered by competent medical examination before embarkation, and ignores other medical certificates made at the time of embarkation declaring that the disease did not exist at that time.

The Facts.

One of the causes of action related to the case of Giuseppe Fusco (the tenth cause of action). As disclosed by the record of the proceedings before the Secretary of Labor (R. 415-441), Fusco, aged 53, resided in Mezzano,

Caserta, Italy, with his wife and six of his 8 healthy children. A son, an American citizen (R. 436), in comfortable circumstances (R. 441), and a married daughter, resided in Phoenixville, Pennsylvania. In the summer of 1926 Fusco decided to return to the United States, in which he had resided for 15 years, since 1901, having freely entered and left the country 5 times, to visit his American children (R. 435).

He was examined by surgeons of the Royal Italian Emigration Service in Naples, found free from tuberculosis or any symptoms of this disease, and was granted an Italian passport on September 20, 1926 (R. 423, 435). The American Consul at Naples issued to Fusco a quota visa on October 1, 1926, to which was attached a certificate of a competent practicing physician who enjoyed the confidence of the American Consul, which certified that Fusco was free from any contagious disease or any other physical defect which might debar him from admission to the United States (R. 422). This visa and medical certificate came into the possession of the Secretary of Labor by virtue of his rules (Rule 3, subdivision G, par. 3, Regulations, January 1, 1930). Such a visa under the 1924 Act is a separate document based upon a verified application by the alien of the character set forth in the record, page 299 (Act Secs. 2 and 7).

Just before embarkation Fusco was examined by petitioner's medical examiners, who also found him to be free from tuberculosis or any symptoms of the disease (R. 423).

Fusco embarked on petitioner's *S. S. Conte Rosso* at Naples on October 13, 1926, and arrived at New York October 23 (R. 434).

The foregoing facts were supplemented by depositions and the testimony of witnesses offered at the trial, which established:

That at Naples the petitioner maintained regularly two and sometimes three resident physicians, whose duty it was to examine all aliens seeking passage to the United States; that a place had been established, called the Emigrant House, properly equipped for such examinations, and at that place the company physicians under the supervision of a doctor attached to the Royal Italian Emigration Service, made careful physical examinations of all immigrants the day before embarkation. At these examinations notations were made of any case suspected of disease or disability, and on the day of sailing all immigrants were again examined at the pier, special attention being given to the cases noted as doubtful.

The final examination at the pier was conducted by a commission authorized by the Italian law, which consisted of at least three doctors and usually two laymen. At that examination every person found to be afflicted with or even suspected of being afflicted with any disease or disability which might bar his admission to the United States, was refused permission to sail. This was no empty formality as is shown by the numerous rejections referred to in the testimony of Dr. Valenzi (R. 62-66).

In addition to the foregoing examinations each alien, as a prerequisite to the granting of a visa, had been required by the American Consul to present a medical certificate issued by a physician specially designated by the Consul to make such examinations and all quota immigrants had been required by the Italian Law to undergo physical examinations as a prerequisite to the issuance of passports.

The result was that before embarkation, every quota immigrant had been submitted to four physical examinations and every non-quota immigrant had undergone three such

examinations (see depositions of Doctors Musu, Izzo and Reale on deposit with the Clerk of this Court).

The examinations at the Emigrant House included clinical examinations by such means as the stethoscope, microscope, magnifying glass, Wasserman test, &c., by outside specialists, to whom the immigrants were sent, whenever the examining doctor suspected that a disease might exist which might be discovered by such methods (Deposition, Dr. Reale, pp. 10-13).

These examinations were conducted in such a manner and with such minuteness that they would have disclosed the existence of any disease or disability which would bar admission to the United States if the disease or disability existed at that time (Deposition, Dr. Baldovino, pp. 8-9). In reporting to the Italian Emigration Service on the effectiveness of such examinations Dr. Baldovino said:

"No sick man, suffering from an infectious disease, passes unobserved through the various tests of which the examination is composed. The sifting of those fit to embark is a sure one."

Ellis Island itself has deported for diseases or physical disabilities only 116 out of 99,236 carried by this line (R. 112, 165). No question can be presented as to the thoroughness with which Fusco and other aliens were examined (R. 51-3, 118).

Fusco was taken to Ellis Island upon arrival, and on November 1, 18 days after embarkation, was examined there by two doctors who certified him to be "afflicted with *tuberculosis pulmonary chronic* which is not easily curable. In our opinion the condition herein certified might have been detected by competent medical examination at the foreign port of embarkation" (R. 434).

November 4, 1926, Fusco appeared before a Board of Special Inquiry at Ellis Island. He was asked a few formal questions, not touching on his alleged illness, was told that he was excluded and had no right to appeal. Fusco was not represented. The Line was not even notified. November 16, 1926, Fusco returned to Italy.

November 26, about the date Fusco arrived in Italy, the office of the Commissioner of Immigration for the Port of New York, notified petitioner of an intention to impose a fine of $1,000 and to require the refund of $95 passage money, based on the certificate of the examining surgeons, and stated:

"If you desire a hearing as to whether a fine should be imposed in this instance, you will be allowed 60 days from the date of this notice for that purpose * * *" (R. 420).

On January 26, 1927, petitioner filed a protest supporting the facts above stated. Duly authenticated certificates of the physicians who made the examinations before embarkation were attached (R. 421-431). This protest and the affidavits of the physicians were accepted by the Department. No criticism was made as to the form of the evidence, nor was the Petitioner requested to amplify it in any respect.

In accordance with the usual practice, the Commissioner of Immigration at New York forwarded the record of the proceedings at Ellis Island, together with the evidence submitted by the Petitioner to the Labor Department at Washington. The proofs were submitted in the usual form (R. 170, 192).

On February 7, 1927, a decision was announced, signed, not by the Secretary of Labor, but by the Commissioner

General and the Second Assistant Secretary, which said in part:

"The protest of the Line * * * has been reviewed, together with the medical certificates forwarded therewith * * *" (R. 415).

The decision recognized that, according to the protest and medical certificates submitted, Fusco had been examined on three separate occasions by competent physicians before embarkation and that no trace of tuberculosis was discovered, and that if in existence at the time of embarkation it was not detectable, it then proceeded (italics ours):

"The alien gave no history of the disease. Indeed he was not questioned with regard thereto, *and the only evidence in the record is the official certificate itself.* The Line's protest, in effect, is merely that the disease was not detected despite three examinations and therefore was not detectable * * *. *It is believed that the evidence placed in the record* by the company is not sufficient to call in question the accuracy of the opinion expressed in the official medical certificate" (R. 415, 416).

The decisions imposing fines were written by John W. Browning, a civil service employee in the Department of Labor, formerly an army officer (R. 184, 186).

Browning, who was put on the witness stand by the Government (R. 184), testified that he did not consider the proof submitted by the Line as evidence (R. 186); that he regarded himself as "an Appellate Court" (R. 191) and considered the protests merely as pleas or comment on the evidence.

The fine and passage refund were paid under protest to the respondent under the duress of his refusal, otherwise, to grant clearance to petitioner's ships (R. 19, 36).

Fusco's story is fairly representative of all cases. In some of the cases there are additional facts which present additional questions. One alien was excluded as an imbecile after having been brought to the United States by special permission of the Department of Labor with knowledge of his condition; another was patently blind but had been granted a visa by the American Consul to come to the United States as a student under a special proviso of the Immigration Law; another was coming to the United States to go in transit to Canada and another alien was a seaman coming to ship foreign. Fines were imposed in all of those cases, and the propriety of such fines depends upon considerations additional to those presented in the case of Fusco.

Proceedings Below.

In a common law trial before Patterson, J., and a jury of one, overwhelming evidence was given in support of the facts above stated both by oral testimony and Italian depositions, showing that the alleged diseases were not discoverable by competent medical examination abroad. The Government, although endeavoring to reserve an objection, joined in offering the depositions (R. 283-284). The trial judge conceded that the testimony tended to show in considerable detail that all passengers were put through at least two examinations by skilled doctors (fol. 1614); but excluded from consideration all evidence not presented to the Secretary of Labor and held that the determination of the Secretary was conclusive on him as to all facts, if there was the slightest evidence in support of his conclusion. He held the certificate of the American doctors to be such support although criticizing it as legal proof. He admitted that

on petitioner's construction of the case of *Oceanic Nav. Co.* v. *Stranahan,* 214 U. S. 320, he should at least try fundamental questions; but declined to do so on the ground that the secretary's "satisfaction" and not the actual fact of discoverability was the fundamental, or as he called it, the crucial question. He did hold, however, that if American doctors had made the examinations in Italy, the decision of the department could not be sustained.

The Circuit Court of Appeals affirmed, holding that the fact of actual examinations was immaterial because "what will satisfy the secretary in that regard", is all that is necessary to impose the fine.

Reasons for Granting the Writ.

1. The questions presented are of great importance to steamship companies because of the financial burdens which have been and are being placed upon them by the unbridled action of the Secretary of Labor in exacting fines without just cause. It is also important that correct principles of administrative action in imposing fines of this character should be authoritatively and finally established for the guidance of courts and administrative officers throughout the United States.

2. It is evident on the face of the opinions of the courts below that they have abdicated to administrative officers the final determination of questions which the courts should reserve for themselves, and that in so doing they have relied upon a misconception of certain dictum in the case of *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, and have ignored restrictions upon administrative action, plainly declared by this court in such cases as *Crowell* v. *Benson,* 285 U. S. (Decided Feb. 23, 1932.)

3. The opinion in the Stranahan case should be clarified and the constitutionality of the provision under which the fines have been imposed should be determined.

DELBERT M. TIBBETTS,
Counsel for Petitioner.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
GASPARE M. CUSUMANO,
Attorneys for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

DELBERT M. TIBBETTS,
Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

DELBERT M. TIBBETTS, being duly sworn, says:

That he is one of the attorneys for the petitioner herein and that the foregoing petition is true to the best of his knowledge, information and belief.

DELBERT M. TIBBETTS

Sworn to before me this
27 day of April, 1932.

NICHOLAS D. LAMORTE
Notary Public

Supreme Court of the United States

LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI,
Petitioner,

against

PHILIP ELTING, Collector of Customs of the Port of New York,
Respondent.

OCTOBER TERM, 1931.
No. .....

BRIEF IN SUPPORT OF PETITION.

The facts involved and the proceedings in the lower courts are set forth fully in the petition.

FIRST POINT.

THE DECISIONS OF THE LOWER COURTS INVOLVE A MISCONCEPTION OF THE RULES ESTABLISHED BY THIS COURT FOR THE REVIEW OF ADMINISTRATIVE DECISIONS.

Twenty-five years of Departmental practice have carried the Department far from the ample bounds set for it by the decision in *Oceanic Steam Navigation Co.* v. *Stranahan* (1909), 214 U. S. 320. The Act considered in that case has been repealed; new Acts and larger penalties have intervened. The new law, as applied in the almost daily practice illustrated in this case, should be tested by principles of the *Stranahan* case both as to construction and constitutionality.

It has been consistently held by this Court that in reviewing administrative decisions a court should try *de novo* any fact of jurisdictional or fundamental character upon which the power of the administrative officer depends. *In re Fassett* (1891), 142 U. S. 479; *Ng Fung Ho* v. *White* (1922), 259 U. S. 276; *Ohio Valley Co.* v. *Ben Avon Borough* (1920), 253 U. S. 287; *Federal Trade Commission* v. *Raladam Co.* (1931), 283 U. S. 643; *Federal Trade Commission* v. *Klesner* (1930), 280 U. S. 19; *Crowell* v. *Benson,* February 23, 1932, 285 U. S.

The section under consideration in this case does two things. It declares it to be unlawful to bring an alien having certain diseases to this country, and it makes the same act a punishable offense when the existence of the disease was discoverable by a competent medical examination abroad.

While the language of the section is somewhat ambiguous, its history makes it clear that the intent of Congress was to impose upon steamship companies the obligation of subjecting all immigrants to examinations at the hands of competent medical examiners before being allowed to embark; and to empower the Secretary of Labor to impose fines in cases in which the Steamship Companies fail to observe that requirement and in which it appears to the Secretary that a disease existed and might have been discovered if the required examination had been made.

A section of this character first appeared in the Immigration Act of 1903, and it has been reenacted without material change, except as to the amount of the fine, which has been raised from $100 in the 1903 Act to $1,000 and refund of passage money in the 1924 Act.

This section as it appeared in the 1903 Act was before this Court in the case of *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, which involved solely the question of the constitutionality of the provision. In upholding its constitutionality, this Court construed that provision as follows (p. 332) (italics ours):

"The power to impose the exaction which the statute confers on the Secretary is lodged in that officer *only* when it results from the official medical examination at the point of arrival not only that an alien is affilicted with one of the prohibited diseases, but that the stage of the malady as disclosed by the examination establishes that the alien was suffering with the disease at the time of embarkation, and that such fact would have been then discovered *had* the medical examination been then made by the vessel or its owners, as the statute requires."

In support of that construction, this Court quoted from the report of the Senate Committee on Immigration which said of the provision in question (italics ours):

"This sufficiently guards the transportation lines from an unjust and hasty imposition of a penalty, insures a careful observance of the law, and leaves in their own hands the power to escape *even a risk* of the fine being imposed, since they can refuse to take on board even the most doubtful case until certified by competent medical authority to be entirely cured."

If the Line is protected by a certificate that the alien is cured, it is surely protected by a certificate that he was not and had not been sick.

This Court then said (p. 334):

"It may not be doubted that it is not open to discussion that the statute as thus construed was within the power of Congress to enact."

That decision was announced in 1909. That interpretation by this Court and by the Senate Committee of the provision as it appeared in the 1903 Act necessarily attached to the provision as it was reenacted in subsequent legislation.

So construed, the Secretary is without power to impose fines if it appears as a matter of fact that the required medical examinations were made before embarkation. In this case, evidence had been submitted to the Secretary which established that the required examinations had been made before embarkation and that the diseases did not exist or were not then detectable. If the trial court doubted the sufficiency of that evidence to establish the fact, it should have received and considered the additional evidence submitted at the trial.

The additional evidence was excluded by the trial court and the exclusion was upheld by the Circuit Court of Appeals on the theory that the satisfaction of the Secretary of Labor is the fundamental fact. The Court below said (55 F. (2d) 1050):

"The only real issue of fact related to the decision of the Secretary of Labor on the question of detectability of the disability abroad * * * Determination of the fact of foreign detectability of an excluding condition has been left to what will satisfy the Secretary of Labor in that regard. This means that whatever the Secretary of Labor decides, provided his decision is neither arbitrary or capricious, is final."

Furthermore, the decision imposed upon transportation companies the liability of an insurer, for the Circuit Court of Appeals said:

"It takes no account of any mistakes an examiner might make and still be a competent man. The burden placed upon a steamship company transporting aliens to our shores is not satisfied by its employing competent examiners to make examination of aliens at the time of embarkation, but it is charged with whatever knowledge it would obtain from a competent examination of each alien at that time."

That Court also appeared to be of the opinion that a transportation company is not entitled to a hearing of any kind, for in this case it said:

"Nor was it error to treat the certificates of medical examiners as evidence of the facts as therein stated."

And in the later case of *United States of America* v. *Steamship Presidente Wilson* (decided March 14, 1932, not yet reported) the same court said:

"On the other hand in *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 321, the finding of the Secretary, based upon the certificate of his medical examiners that aliens were afflicted with contagious diseases whose existence could have been detected on embarkation, was held to be so absolute that the carrier might be deprived of a hearing."

The lower courts appear to have misconceived what was before this court for determination in the Stranahan case and to have erroneously applied certain language in that case which is not pertinent to the situation presented in this case.

In the Stranahan case the Line did not deny that the disease existed at the time of arrival or that the Steamship Company had failed to cause any examinations to be made before embarkation, or that the disease may have existed

at embarkation, 155 Fed. 428-429. The plaintiff in that case relied solely upon the contention that the Statute or the procedure under it or both were unconstitutional. All other questions were treated as immaterial.

On the facts so presented this Court pointed out that the Act might be upheld as constitutional, even though the certificate of the medical officers should be treated as conclusive of the condition of the alien for the purpose of imposing fines (p. 342).

The statute did make such a certificate conclusive of the condition of the alien upon arrival so far as the exclusion of the alien was concerned (8 U. S. C., Sec. 153, last proviso). It was contended by the plaintiff, in that case, that although the certificate might be made final so far as exclusion was concerned, it could not be made final for the purpose of imposing a penalty.

On that point the court remarked that conclusive effect might be constitutionally given to the medical certificate for the purpose of imposing a penalty "for the *negligent* bringing in of an alien" (p. 342).

Considered in connection with the earlier statement that the certificate might be made conclusive of the condition of the alien upon arrival, it seems evident that the later statement with regard to its effect with relation to imposing a penalty was intended to treat the certificate as conclusive of the condition upon arrival and not of the supposed condition at the time of embarkation. The statement is, however, limited to cases of the negligent or wrongful bringing in of the alien. It has no application to cases like the present in which admittedly the required examinations had been made and there is no evidence of negligence or wrongful act.

The lower courts, however, appear to have construed this language as making the medical certificate or opinion conclusive of the condition of the alien not only upon arrival, but also at the time of embarkation, notwithstanding proof of competent examinations and non discoverability abroad. There is no authority either in the statute or in the language of the Stranahan case which supports any such proposition.

On these misconceptions of the Stranahan case, and disregarding the rule firmly established by this Court providing a judicial review of fundamental or jurisdictional facts, the lower courts denied the petitioner the right to make proof of its compliance with the law and consequent immunity from the fines which had been imposed.

SECOND POINT.

THE DECISION IN THE STRANAHAN CASE AS TO THE ACT OF 1903 DOES NOT SUPPORT THE CONSTITUTIONALITY OF THE ACT OF 1917 OR 1924 AS CONSTRUED AND APPLIED IN THIS CASE.

The Stranahan case (214 U. S. 320) was a direct challenge to the power of Congress; all the inferences of fact were conceded in favor of the government. The court held the Act of 1903 within the power of Congress to regulate Immigration under the Commerce Clause.

And the Act was held not to be violative of the due process clause as construed and applied.

In the first aspect, the section was held not to be faulty as imposing criminal punishment without criminal trial. Secondly the court held it was not faulty as an Act providing for enforcement of penalties by mere administrative measures, without any judicial trial, in cases where there was no evidence of compliance with the law by the carrier.

In this connection the court determined that the $100 penalty therein declared was not criminal punishment because of the purported Congressional intent. The court said (337) (italics ours):

"* * * its various sections accurately distinguish between those cases where it was *intended* that particular violations should be considered as criminal * * * and those where it was *contemplated* that violations should not constitute crime, but merely entail the infliction of a penalty * * *."

If it is the law that Congress can, by legislative composition, indicate that a financial exaction of $1095 is a penalty which may be committed to the exclusive determination of an administrative officer, then the present Act must be upheld on this point.

The Stranahan case does not assert any such proposition; in the consideration of the second mentioned aspect of due process, the Chief Justice said that Congress might grant exclusive administrative power "to impose appropriate obligations and sanction their enforcement by *reasonable money penalties*" (339). The Chief Justice was considering a $100 penalty; the Act he considered was repealed; the fine now under consideration is $1095, practically the same amount this court held excessive for administrative enforcement in *Lipke* v. *Lederer* (1922), 259 U. S. 557.

Congress, itself, has recognized in this Act that $200 may be suitable punishment for a misdemeanor (8 U. S. C., s. 146).

The imposition in this case must fall; it is condemned by the test applied by this court in the Lipke, and Strana-

han cases, and declared in *Schick* v. *United States* (1904), 195 U. S. 65, 68: "The truth is the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors." The only alternative to unconstitutionality is construction to permit judicial process. In either event, the decision below should be brought in line with the decisions of this court.

The Circuit Court of Appeals ignored the point; the District Court ignored *Lipke* v. *Lederer*.

It is submitted that the Act as construed and applied by the Secretary of Labor and the lower courts in this case, is unconstitutional.

THIRD POINT.

EVEN IF THE POWER OF FEDERAL COURTS IN THIS CASE WERE LIMITED TO REVIEW AS TO ARBITRARINESS, THE POWER WAS NOT EXERCISED IN ACCORDANCE WITH LEGAL PRINCIPLES.

Administrative determinations even where discretionary are subject to judicial principles. The final judgment is legally effective only when arrived at by real interpretation of all considerations presented. A department must weigh all considerations presented, and must afford actual consideration to the matters it purports to receive. In short "these tribunals are not bound by the rules of evidence applicable in a jury trial. But they are bound by rules of reason and logic—by what is commonly referred to as common sense." *Mason* v. *Tillinghast* (C. C. A. 1) 27 F. (2d) 580.

In arriving at its amazing "belief" that the disease was discoverable at embarkation, when the actual truth as shown was that the disease was not discoverable by competent medical examination, the Department utterly ignored evidence put in its possession by statute and by the petitioner. Moreover, it purported by its orders and practice to accept matters as evidence from the accused, which in fact it did not consider.

The medical certificate attached to the visa came into the hands of the Department. By Consular Regulation (R. 294, 295), sections 162, 164, proposed by Secretary of Labor, this "completely, correctly and conclusively" showed that Fusco did not have tuberculosis when the passport visa was granted. Although this was evidence sanctioned by Regulation, it was not considered by the Secretary or incorporated in his minutes of the fine proceedings.

Likewise a sworn statement on the ship's manifest signed by the ship's doctor establishing that Fusco had been examined before embarkation and showed no evidence of disease, although in the possession of the Department, was not considered. This certificate is provided for in the Statute itself (8 U. S. C. Sec. 149). The certificate of the examinating doctor at Ellis Island is likewise contemplated by statute, but it is declaratory only of the condition on the date of examination after arrival.

It thus appears that three statutory medical certificates were issued, two speaking of a fact and the third speaking of an opinion derived from a fact. All had come into the possession of the Department. The Secretary's decision ignored the factual certificates and considered itself bound by the opinion certificate. This lawless practice was not

commented on by the lower courts. Such departure from the course of legal procedure should be corrected.

Failure to incorporate into the record of an administrative proceeding, all of the evidence which was before the administrative officer, in itself, justifies judicial review. *Kwock Jan Fat* v. *White* (1920), 253 U. S. 454.

Moreover the department purported by its order to consider what it called "the evidence placed in the record by the company" consisting of the protest and the affidavits of two doctors certifying that Fusco had been examined prior to embarkation. By the confession of the very man who wrote the decision, that statement was misleading. He considered himself an appellate court (R. 191), and considered the protest merely as comment on the evidence (R. 192) and not as evidence (R. 186). Protests were the conventional means of presenting evidence to the department. Not one word appearing in any decision of the Department attacks the form of proof. It was simply ignored. This violates not only rules of judicial procedure, but of common convention.

The District Court, ignoring the evidence of the visa and manifest, and excluding the other evidence offered at the trial, sustained the holding of the Secretary as not arbitrary, and in effect held that the Ellis Island certificate was conclusive regardless of whatever evidence there was the other way. That conclusion was upheld by the Circuit Court of Appeals.

Neither of these courts recognized that: "insufficient evidence is, in the eye of the law, no evidence" and that "when we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the

fact sought to be proved is established". These are statements of judicial rules of thumb quoted in *Matter of Case* (1915), 214 N. Y. 199, 203.

A department's exaction is not placed beyond judicial recall every time an employee expresses an opinion in relation thereto. The lower courts have failed to apply the common judicial test to the procedure of the department.

The facts stated in the protest, and the certificates submitted therewith were proper proof of the matters alleged. This has been so held. *Bermuda & West Indies S. S. Co.* v. *Elting* (S. D. N. Y.) 45 F. (2d) 411. The district judge conceded our proof established the truth and conceded that a certificate of an American Consular doctor made about the time of embarkation in accordance with present practice, would be conclusive evidence of non-discoverability at that time.

The examinations shown by the evidence in this case were of the same character as those conceded to be sufficient by the district judge, except that they were made by Italian doctors.

The district court must accept the truth of the statements of the protest. It could not decline the legal proof of the true facts in the case because not submitted in that form to the department and at the same time measure the proof before the Secretary by judicial standards. Both courts comment on the technical deficiencies of petitioner's proof. The court must have failed to accept the evidence purported to have been accepted by the Department; or must have applied the scintilla of evidence rule. In no other way could they support a finding on a concededly disproven point.

The departmental practice in this case has placed fiction on fiction, presumption on presumption, so that when a final judgment is uttered it has no relation to the actual facts.

FOURTH POINT.

OTHER ISSUES PRESENTED BY THE RECORD INVOLVE CONSIDERATIONS IN ADDITION TO THOSE HERETOFORE DISCUSSED.

The special class of cases here referred to are those involved in the 5th and 12th causes of action, in which the aliens were going in transit to Canada; the 2nd, 3rd and 13th causes of action, in which the aliens were excluded on the ground that they were suffering from disabilities which might affect their ability to earn a living; the 14th cause of action, in which the alien was a seaman coming to the United States to join the crew of another vessel; the 15th cause of action, in which the alien was brought to the United States by the express permission of the Labor Department.

TRANSIT ALIENS.

The Court allowed the recovery of one of these fines because the alien eventually was admitted for transit to Canada. Recovery of the other fine also should have been allowed because the Act contemplates the imposition of fines only in case of aliens coming for admission to the United States. Such cases fall within the principles of *Taylor* v. *United States,* (1907) 207 U. S., 120 and *Dollar Steamship Line* v. *Elting,* 51 F. (2d) 1035.

Seaman's Case.

The alien involved in the 14th cause of action was not coming to the United States as an immigrant. He had been employed in Italy to go to the United States to join the steamship *Transylvania,* which was in the port of New York ready to sail. This case also falls within the principle of *Taylor* v. *United States* (1907), 207 U. S. 120, and *Dollar Steamship Line* v. *Elting,* 51 F. (2d) 1035.

Aliens Suffering from Physical Defects.

One of these fines was imposed on the ground that the alien was suffering from an abnormal systemic condition, discoverable only by the use of the Wasserman test (2nd cause of action). This was a condition which could not properly be said to have been discoverable before embarkation, as was subsequently ruled by the Surgeon General's office (R. 290-291).

In another case the alien was certified as being afflicted with valvular disease of the heart. Whether such an ailment would affect the ability of the alien to make a living was not a question solely for medical consideration. The determination of that question depends upon many circumstances, including the nature of the defect, means of livelihood employed by the alien and the judgment of the official whose duty it is to determine the question. It could not be determined until the alien was brought to the United States what the Immigration Officials in the United States might decide as to the alien's admissibility. The case therefore falls within the ruling of *Compagnie Francaise* v. *Elting,* 19 F. (2d) 773.

The fine involved in the 13th cause of action was imposed on the ground that the alien was blind, a disability which might affect his ability to earn a living. That he was blind was evident, but he claimed to be coming to the United States as a student. He held a visa issued by the American Consul under section 4 (e) of the Act of 1924, which exempts from the quota students going to accredited schools. That question could only be properly determined either by the American Consul pursuant to Consular Instructions 140, 141, 142 (R. 292, 293) or by Immigration Officials at the port of arrival. The case therefore properly falls within the principles of *Compagnie Francaise* v. *Elting,* 19 F. (2d) 773, and *Spanish Royal Mail Line Agency, Inc.,* v. *United States,* 45 F. (2d) 404.

The fine involved in the 15th cause of action was imposed on the ground that the alien was an imbecile. The father of the alien, an American citizen, had made special application to the Labor Department for permission to bring his son to the United States, and in that application disclosed his condition. The Labor Department specially authorized the American Consul in Italy to grant a visa to this alien, and he was accepted for transportation on the faith of the visa granted pursuant to such special authorization. These documents were evidence either that the Department had already decided that this alien was admissible or had reserved the question for final determination at the port of arrival. By this an estoppel had been created against the imposition of the fine. *Spanish Royal Mail Line Agency, Inc.* v. *United States,* 45 F. (2d) 404; *Compagnie Francaise* v. *Elting,* 19 F. (2d) 773.

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

April 27, 1932.

Respectfully submitted,

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